Sentencing Pregnant Drug Addicts: Why the Child Endangerment Enhancement is Not Appropriate

Monica B Carusello, Florida State University
Sentencing Pregnant Drug Addicts: Why the Child Endangerment Enhancement is Not Appropriate
I. Introduction

Does being pregnant when you commit a crime make you guiltier than someone who is not pregnant? Apparently that is the new and frightening precedent being set. This summer, in a case now pending appeal in the Sixth Circuit, a Federal judge decided that a Tennessee woman, Lacey Weld, should face a longer prison sentence because she was pregnant while she was involved in a methamphetamine (hereinafter “meth”) manufacturing operation. The judge elected to impose an enhanced sentence on the grounds of child endangerment. The judge cited “substantial risk of harm to a minor” as the reason that the enhanced sentence was justified. U.S. Attorney William C. Killian issued a statement on the sentence, indicating the precedent will guide future sentencing, citing a “tragic rise” in the number of drug-addicted babies, and saying that “through this prosecution, the U.S. Attorney’s Office sends a message that, should a child, born or unborn, be exposed to a substantial risk of harm through the manufacture of methamphetamine, we will pursue any available enhancements at sentencing.”

The question before the judge was whether or not the Federal Sentencing Guidelines around child endangerment apply to fetuses, but really it was more far-reaching than that; it was whether or not women should be subject to a distinct set of laws by virtue of their pregnancies. This question Judge Varlan answered in the affirmative, which this note argues set a dangerous legal precedent for gender discriminatory laws and may lead to de facto fetal personhood as a judicial fiat. From this case, it can be understood that there will now be a set of separate and unequal laws that apply to women from the moment they carry a fertilized egg.

---

1 Katie McDonough, *Federal judge: Pregnancy can be grounds for enhanced criminal penalties*, Salon (July 15, 2014), http://www.salon.com/2014/07/15/tennessee_woman_may_face_a_double_prison_sentence_simply_because_she_was_pregnant/.
that by becoming pregnant, a woman can now be arrested for crimes that exist for no one else; that women can be subject to doubly punitive laws.4

This debate regarding drug-addicted criminals was largely had in the 1980s and early 1990s with the “crack baby” hysteria, but now it is rearing its ugly head again through sentencing decisions. States have primarily used child abuse, neglect, endangerment, controlled substance, homicide, and manslaughter statutes to punish pregnant drug-addicted women for allegedly exposing their fetuses to potential harm.5 Using these enhancements is simply bad policy. The states’ purposes behind the prosecutions of pregnant drug-addicted women are to protect the fetus from abuse and to deter women from using drugs during pregnancy; however, instead of providing drug-addicted mothers with drug treatment, the result of the prosecutorial strategy is to send a considerable number of women to prison.

This note will explore the framework in which laws criminalizing pregnant women have developed and argue that this new sentencing precedent violates women’s rights and is dangerous to society. This note presents non-judicial remedies, including treatment and early-intervention, as the best solutions to handling the problem of drug-addicted women and drug-exposed newborns.

While almost certainly not unconstitutional due to the State’s strong interest in health, public safety, and the lack of explicit targeting of suspect classes; it certainly implicates constitutional concerns, impacts abortion rights, and is a poor interpretation of the Federal Sentencing Guidelines (Guidelines). This note will make the case that the Weld sentence was excessively punitive because fetuses are not people or “minors” and that even if they were considered “minors” under the Guidelines, the harm to a drug-exposed fetus is not so severe as considered

4 Katie McDonough, Federal judge: Pregnancy can be grounds for enhanced criminal penalties, SALON (July 15, 2014), http://www.salon.com/2014/07/15/tennessee_woman_may_face_a_double_prison_sentence_simply_because_she_was_pregnant/ (reporting remarks from Lynn Paltrow, executive director of National Advocates for Pregnant Women (NAPW)).

to warrant the use of the substantial risk to a minor enhancement. The *Weld* decision should be reversed and child endangerment enhancements should be prohibited in the cases of pregnant drug-addicted women.

I. **Lacey Weld: A Case Study**

Lacey Weld, age twenty-six, was picked up in an undercover sting at a meth manufacturing plant in a rural part of Jefferson County, Tennessee. Weld cooperated in the case and testified against her co-defendants. She pled guilty and was sentenced to more than twelve years in prison and five years of supervised release for her involvement in manufacturing meth. Judge Varlan, who decided the case for the United States District Court for the Eastern District of Tennessee, used the Guidelines’ enhancement to tack on an additional six years simply because Weld was pregnant.

The question in Weld’s case was not about new criminal charges because of her pregnancy, but rather enhancing the sentence for the crime to which she had already pled guilty. Judge Varlan held that Weld was extra guilty because she put her unborn child at a substantial risk of harm. However, Weld was not convicted of smoking meth; she was convicted of conspiracy to manufacture. The Department of Justice justified the penalty in part because Weld had “apparently used methamphetamine while pregnant.” It is significant to note that

---


7 Id.

8 Id.

9 Id.


drug use is not a crime under Tennessee or federal law.\textsuperscript{12} Imposing criminal sanctions for using meth, a non-existent crime, violates clear due process principles and prohibitions on ex post facto laws.

Weld was convicted of manufacturing, not possession of, methamphetamine.\textsuperscript{13} Tennessee law allows sentence enhancements if the victim is especially vulnerable, but Weld was not convicted of victimizing her son. Those six extra years were for a crime that is, in fact, not a crime in Tennessee at all. Weld's son was born sick and tested positive for opioids and meth.\textsuperscript{14} Weld accepted responsibility for exposing her son to drugs in utero, telling the court, “He could have died, and I just pray and thank God that my sister has him and he's OK.”\textsuperscript{15}

There are a whole host of things that could cause harm to a fetus in utero, including caffeine, too little sleep, too much exercise, alcohol, and tobacco.\textsuperscript{16} Weld's defense attorney, John Eldridge, said “there's no proof as to what caused the withdrawal. There was drug use, and there was exposure in a meth lab...[Testimony] just said opioids and meth were in the baby's


system, so the judge concluded that it was meth exposure [which caused withdrawal symptoms]. I think it's opioids.”

The law does not generally allow women to be punished for behaving badly while pregnant; however, with sentence enhancements, a new precedent is being set to criminalize things that would otherwise not be crimes if not performed while pregnant. In Weld’s case she received an enhanced sentence because she took part in an unhealthy, but not illegal, activity while pregnant. Allowing punishment for unhealthy, legal, choices opens the door to all types of paternalistic policing of pregnant women’s behavior.

Eldridge also reported that he did not believe that this particular enhancement was ever designed for pregnant women. Eldridge believes the law was intended to prevent “substantial risk of harm to life of a minor or an incompetent” and does not mention harm to a fetus. While there is no civil right to be pregnant in a meth lab, pregnant women do have the right to be treated as equals to those who are not pregnant in the criminal justice system.

II. The Problems With Punishing Pregnant Drug-Addicted Women for Harm to a Fetus

Criminalizing pregnancy has been criticized as being a mechanism for enforcing racial oppression deeply rooted in the tragic practice of slavery in addition to implicating constitutional rights, being discriminatory, and being based on a misunderstanding of medical science.

A. Bad Policy

The tragedy of drug-exposed babies is initially a tragedy of drug-addicted mothers. Both are part of a larger tragedy of a community that is suffering a host of indignities, including,

---

significantly, the denial of equal respect for its women's reproductive decisions. The punishment of drug addicts who chose to carry their pregnancies to term violates their constitutional rights to equal protection and privacy regarding their reproductive choices. Using child endangerment sentence enhancements not only conflicts with constitutional concerns, but is also a poor way of promoting fetal health.

Poor drug addicts are punished for having babies because they fail to measure up to the state’s ideal of motherhood. Prosecutors have brought charges against women who use drugs during pregnancy without demonstrating any harm to the fetus. For example, in *Johnson v. State*, the prosecution failed to introduce any evidence that her children were adversely affected by her crack use. To the contrary, there was testimony that the children were healthy and developing normally.

Beyond that, when the primary effect of a government policy is punishing primarily poor, predominately Black women having babies, a shadow of racial eugenics is evoked, especially in light of the history of abuse of women of color. It is clear that these women are punished because they are seen unfit to bear children due to their poverty, race, and drug addiction. The right to bear children goes to the heart of what it means to be human. The value we place on individuals determines whether we see them as entitled to perpetuate themselves...

---

23 The reproductive capacities of Black women have historically served as a primary site for punishment within the criminal justice system. Black women are particularly vulnerable to an array of ideological constructions, including that of sexual promiscuity and bad mothering, that position them as failing fundamental aspects of feminine gender identity. Because of these failings, women who have been criminalized or incarcerated are later subjected to punishments that involve the prevention or punishment of their choice to reproduce, often as a formal part of their sentences. See Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 Cal. L. Rev. 1239, 1252 (2012).
in their children. Denying a woman the right to bear children — or punishing her for exercising that right — deprives her of a basic part of her humanity.\textsuperscript{24}

Protecting fetuses is a valuable government motive; however, enforcing unduly punitive measures against mothers is not a productive way to ensure fetal health. While fetal exposure to meth or other drugs is certainly not desirable, it is not so detrimental to the health and development of the fetus as to merit such punishments of the mother. The narrative of “meth babies” that seems to be driving much of this prosecution is based on more hysteria than fact.

In 2005, addiction specialists and medical associations released a letter calling for responsible and accurate reporting on the issue based on science, not presumption or prejudice.\textsuperscript{25} The use of stigmatizing terms, such as "ice babies" and "meth babies," the doctors explained, lack scientific validity and should not be used.\textsuperscript{26} Experience has demonstrated that similar labels applied to children exposed to cocaine has resulted in lowered expectations for their academic and life achievements, has discouraged investigation into other causes for their possible physical and social problems, and lead to policies that ignore factors like poverty that may play a much more significant role in their lives.\textsuperscript{27}

By definition, babies cannot be addicted to meth or anything else. Addiction is a technical term referring to compulsive behavior that continues despite adverse consequences.\textsuperscript{28} As described in the Open Letter, “in utero physiologic dependence on opiates (not addiction), known as Neonatal Narcotic Abstinence Syndrome, is readily diagnosable and treatable, but no such symptoms have been found to occur following prenatal cocaine or methamphetamine

\textsuperscript{24} Id. at 1472. See also Kenneth L. Karst, The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 32 (1977).
\textsuperscript{26} Id. at 1.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
exposure.”

Medical professionals have warned that the spread of false information results in “punitive civil and child welfare interventions that are harmful to women, children and families rather than in the ongoing research and improvement and provision of treatment services that are so clearly needed.” Here, the most productive solution to promoting health is not to break up families by means of incarceration, but rather to preserve the family and help women get sober and become responsible mothers.

In 1990, The American Academy of Pediatrics’ Committee on Substance Abuse adopted a policy statement that “punitive measures taken toward pregnant women, such as criminal prosecutions and incarceration, have no proven benefits for infant health . . .” Women in prison are taken from their families and receive few resources to help them overcome addiction. Additionally, women in prison are not afforded the opportunity to refine their parenting skills. The AAP is concerned that such involuntary measures may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment.” If we are really concerned about fetal health and the development of healthy citizens, then incarcerating drug-addicted mothers is counterproductive.

Even if imposing enhanced sentences on drug-addicted mothers could be proved to further the state’s interest in child welfare, they would surely fail the “least restrictive alternative” standard which requires that “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental

29 Id.
30 Id.
32 Id.
personal liberties when the end can be more narrowly achieved."

Currently, these enhanced sentences are disrupting families, failing to provide support and resources for women, and even deterring healthy pregnancies and encouraging the termination of pregnancy. If becoming pregnant as a drug addict subjects a woman to doubly punitive sentences, it affects her decision to become a mother. It is an infringement on her liberty. So what would be the least restrictive alternative available to further the state’s interest in child welfare? The problem of drug-exposed babies would be best addressed through adequate prenatal care for poor women and drug treatment programs that meet the needs of pregnant drug-addicted women.

As the experiences of slavery, the War on Drugs, and today have taught us: government control of pregnancy punishes women for having babies, perpetuates the notion that a woman’s value is determined exclusively by her ability to procreate, and deems the poor, Black, and drug-addicted as unworthy of the dignity of childbearing. Arguably, the government is better suited to make decisions about fetal care than the drug-addicted mother. However, allowing the government to determine who is entitled to be a mother is a wholly separate matter. State interference in the decision to have children is more constitutionally significant than control of lifestyle choices. Moreover, the lack of safe abortions and the lack of resources necessary for healthy pregnancies and parenthood already limit the reproductive freedom of

34 Attempts to resist sexual exploitation and domination contributed to the characterization of Black women as bad mothers. See DARLENE CLARK HINE, HINE SIGHT: BLACK WOMEN AND THE RE-CONSTRUCTION OF AMERICAN HISTORY 31 (1994). Women often refused to bear children who were conceived in acts of violence or to raise their children in a state of servitude. See Id. The slaveholding class interpreted this resistance as a sign of Black women’s status as degenerate mothers. One southern physician suggested “[a]ll county practitioners . . . are aware of the frequent complaints of planters about the unnatural tendency in the African female population to destroy her offspring. Whole families of women . . . fail to have children.” See Id. This construction of Black women as bad mothers endured beyond slavery and supported a new system of racial subordination in which Black women continued to be exploited through the state’s policing of crime. A new construction of the Black woman as an inherently dangerous and morally corrupt criminal appeared in post-slavery America. See Priscilla A. Ocen, Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners, 100 CAL. L. REV. 1239, 1271 (2012).
many women, disproportionately poor women of color. The government both directly interferes with their decisions and fails to facilitate them.\textsuperscript{35}

Enhancing the sentences of pregnant drug-addicted women is bad policy. First, it is unclear how much actual harm there is to the fetus. Second, the marginal deterrence benefit of incarceration is surely outweighed by the harm incarceration causes to women and families. Lastly, these kinds of sentence enhancements are discriminatory and are in tension with abortion and other constitutional rights.

B. Equal Protection

While officials are calling \textit{Weld} the first case of its kind, criminalizing women based on their pregnancies is hardly a new phenomenon. Between 1973 and 2005, there were four hundred and thirteen documented cases where a woman’s pregnancy was a necessary factor in the criminal charges brought against her by the state.\textsuperscript{36} In addition to those four hundred and thirty cases, the National Advocates for Pregnant Women (hereinafter NAPW) has identified three hundred and fifty distinct cases in the last decade in which a woman’s pregnancy was a determining factor in her prosecution or detention.\textsuperscript{37} The judiciary is reading into the Federal Sentencing Guidelines the ability to enforce especially punitive sentences based on a degraded notion of the drug-addict, as these judges seem to believe it is their paternal responsibility to punish them for their choice to have a baby because they see them as unfit mothers.

i. Gender

\textsuperscript{35} Dorothy E. Roberts, \textit{Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy}, 104 HARV. L. REV. 1419, 1461 (1991). One of the most significant obstacles to receiving prenatal care is the inability to pay for health care services. \textit{See id.}

Institutional, cultural, and educational barriers also deter poor women of color from using the few available services.


\textsuperscript{37} Katie McDonough, \textit{Federal judge: Pregnancy can be grounds for enhanced criminal penalties}, SALON (July 15, 2014), http://www.salon.com/2014/07/15/tennessee_woman_may_face_a_double_prison_sentence_simply_because_she_was_pregnant/ (Reporting remarks from Lynn Paltrow, executive director of National Advocates for Pregnant Women (NAPW)).
The criminalization of maternal substance abuse singles out women for punishment. No similar or equal law exists for men. Men who give pregnant women drugs and who help conceive children do not get prosecuted for the harm they may have caused to the children despite studies which suggest that the sperm of male substance abusers can lead to health risks for fetuses.\textsuperscript{38} However, pregnant drug-addicted women who give birth to healthy babies may still be charged under criminal statutes for exposing their fetuses to “harm.” This indicates that there are special gender discriminatory laws in place that penalize women for a condition, pregnancy. In each of these cases, because they were pregnant, women were deprived of the basic constitutional rights of due process and a right to legal counsel.\textsuperscript{39} This differential, gender-based treatment is discrimination in violation of the Equal Protection Clause of the Constitution.\textsuperscript{40}

The problem with this argument under the Equal Protection Clause is that in some situations, pregnancy-based classifications may only receive deferential rational basis review.\textsuperscript{41} Although gender-based classifications are subject to heightened, intermediate scrutiny, pregnancy-based classifications are not necessarily gender-based classifications and thus do not necessarily receive this same high level of scrutiny.\textsuperscript{42} It is incomprehensible how pregnancy-based classifications are not gender-based classifications, since despite our most modern medical advances; men can still not become pregnant. However, under the rational basis test, the state only has to demonstrate that the classification is rationally related to a legitimate

\begin{flushleft}
\textsuperscript{39} Id. at 306.
\textsuperscript{40} See e.g., Michelle Oberman, \textit{Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs}, 43 HASTINGS L.J. 505, 526-31 (1992) (concluding that a Minnesota law regarding the reporting of prenatal exposure to controlled substances would fail intermediate scrutiny, given that the government interest in pre-viable fetal life is not sufficient to permit state regulation of mothers’ bodies).
\textsuperscript{42} Id. (“While it is true that only woman can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification...”)
\end{flushleft}
government interest,\textsuperscript{43} so an equal protection attack premised on sex discrimination would likely not prohibit the prosecution of drug-addicted pregnant women.

\textbf{ii. Race}

Studies indicate that approximately the same percentage of white and African American women use drugs during pregnancy\textsuperscript{44}; however, another study indicates that a pregnant African American woman is almost ten times more likely than a pregnant white woman to be reported to health authorities for drug use.\textsuperscript{45} This racial disparity in reporting and the subsequent prosecution and sentencing of drug-addicted women leads to a belief that there is a discriminatory purpose motivating state prosecutors’ desire to make maternal substance abuse a crime.\textsuperscript{46}

However, such disparities do not prove that the prosecutions are unconstitutional because the Supreme Court has interpreted racial discrimination narrowly under the Equal Protection Clause, requiring discriminatory intent in addition to a disparate impact.\textsuperscript{47} It is difficult to prove that the state actually intended to discriminate against pregnant, drug-addicted, African American women in its prosecutions for maternal substance abuse. In order to prove such intent, a litigant would likely have to show evidence indicating a pattern of disparate treatment that is unexplainable on any other grounds, or is a departure from the normal procedures for bringing charges against drug-addicted women.\textsuperscript{48}

\textsuperscript{45} Ira J. Chasnoff et al., \textit{The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida}, 322 NEW ENG. J. MED. 1202, 1204 (1990).
While prosecuting pregnant-drug addicted women may not be facially racially discriminatory, race is certainly implicated in the prosecutions and subsequent sentencing of pregnant drug-addicted women and should be considered in analyzing the validity of the use of child endangerment enhancements.

C. Right to Privacy

Punishing women for having babies violates their constitutional right to privacy for two reasons: it violates the right to autonomy they have over their reproductive decisions, and it creates a discriminatory government standard for childbearing. Using the privacy doctrine to advocate for women is useful because it emphasizes the value of personhood and protects against abuse of government power.49

People who use illegal drugs are already subject to punishment under an array of criminal laws in this country. Pregnant women are not exempt; they can be prosecuted under these laws.50 Punishing drug addicts who choose to carry their pregnancies to term unconstitutionally burdens the right to autonomy over their reproductive decisions as established in Roe v. Wade, where the Supreme Court held that the right to privacy “whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action...or...in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”51 By violating poor, predominately Black women’s reproductive rights, the government is perpetuating a racist

---

49 Id.
50 Carol S. Larson, Overview of State Legislative and Judicial Responses, 72, 74 THE FUTURE OF CHILDREN (Spring 1991), available at https://www.princeton.edu/futureofchildren/publications/docs/01_01_06.pdf.
hierarchy in our society. Thus, prosecutions impose a standard of motherhood that is offensive to both principles of equality and privacy.\textsuperscript{52}

A woman does not lose her right to privacy when she becomes pregnant. The constitutional right to privacy extends to “both women and men, regardless of their biological differences.”\textsuperscript{53} Pregnant women remain persons under the Constitution. For these reasons, states’ mechanisms for punishing drug-addicted women—child abuse, endangerment, controlled substance abuse, manslaughter, and homicide statutes—infringe upon their fundamental right to privacy because these mechanisms are simply punishing them for exercising her constitutional right to procreate.\textsuperscript{54} Women have a constitutional right to become pregnant and give birth despite drug dependence.\textsuperscript{55} By punishing a woman for her behavior during pregnancy, the state infringes upon her personal autonomy, her right to be “free from interference by others and the ability to flourish among and in relation to others.”\textsuperscript{56}

Those who support enhanced sentences believe that the woman’s freedom must be jeopardized in order to convince her to stop using drugs or to enroll in a treatment program.\textsuperscript{57} Criminal prosecutions; however, may do just the opposite. Fear of prosecution will deter these women who already lack many of the resources necessary for a healthy pregnancy, from seeking care, confiding in their doctors, and participating in treatment.\textsuperscript{58}

\textsuperscript{54} See \textit{id.} at 278-79.
\textsuperscript{56} Reitman at 280.
\textsuperscript{57} Carol S. Larson, \textit{Overview of State Legislative and Judicial Responses}, 72, 80 \textit{THE FUTURE OF CHILDREN} (Spring 1991), available at https://www.princeton.edu/futureofchildren/publications/docs/01_01_06.pdf.
\textsuperscript{58} Many of these opponents also believe that this deterrence will result from automatically involving the child protective services agency when a pregnant woman uses drugs. See Carol S. Larson, \textit{Overview of State Legislative and Judicial Responses}, 72 \textit{THE FUTURE OF...}
There is a strong tie between abortion rights and criminalizing dangerous behavior while pregnant. The threat of enhanced sentences weighs on women’s choice to have children, a strong liberty and privacy interest. Women fearing criminal prosecution for drug abuse while pregnant are less likely to seek help or carry their pregnancies to term. The states’ prosecutorial strategies discourage pregnant drug-addicted women from seeking pre- and post-natal care because of fear. This same fear of criminal punishment for her prenatal drug use makes it more likely she will turn to abortion. The government’s chief response to the problem of drug-exposed babies should be to recognize women’s worth and entitlement to autonomy over their reproduction. The proper solution to ensure healthy babies, and therefore a healthy society, is a government committed to guaranteeing these fundamental rights of women, rather than punishing them.

The right to privacy argument is limited by the state’s interest in protecting the life of the unborn. The right to privacy is not absolute; it must be balanced against the state’s interest in protecting the potential life that the pregnant drug-addicted woman is carrying. However, there is rarely, if ever, a context in which the state is justified in using the criminal justice system to interfere with a woman’s child-bearing decisions.

D. Due Process


61 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 869 (1992) (“The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.”); see also Roe v. Wade, 410 U.S. 113, 154 (1973) (finding that right to privacy is subject to some limitations, including State’s interest in “safeguarding health, in maintaining medical standards, and in protecting potential life.”).

62 See Roe, 410 U.S. at 155 (“At some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.”).

63 See Reitman at 278.
The Due Process Clause requires that “[w]hen an individual’s life, liberty or property is to be curtailed by the government, that individual must receive notice from the government, which usually occurs through the publication of laws passed by the legislature.”64 The state violates the fair notice requirement when it fails to warn drug-addicted women that their fetuses will be treated as children or victims and that they will be criminal offenders for “harming” the fetuses for purposes of child abuse, neglect, endangerment, homicide, manslaughter and controlled substance abuse statutes.65 Women do not have fair notice that child abuse, neglect, endangerment, homicide, manslaughter, and controlled substance statutes apply to their maternal behavior’s potential, and actual, effects on the fetus.66

The Due Process argument is weakened because states have been prosecuting drug-addicted women for their behavior during pregnancy since the late 1970s, which makes it difficult to accept the claim that these women lack fair notice.67 The extensive media coverage reporting on drug-exposed babies in the womb may also put women on some notice that their behavior could potentially harm their fetus.68 Still, women may not be aware that statutes written to protect children will apply to fetuses.

III. Sentencing

Prosecutors and proponents of criminalization believe that severe punishments will act as disincentives for women who are likely to engage in drug use during pregnancy. They claim “that the creation of crimes that punish women who endanger their fetuses would educate the public through ‘the publicity accompanying the trial, conviction, and sentencing’ of the ‘proper

65 Id. at 540.
66 Id. at 525, 540, 551.
distinctions between good and bad behavior.” They have sought to accomplish deterrence and the protection of potential life by prosecuting these women under an array of criminal statutes.

Some mechanisms that prosecutors have used to prosecute drug-addicted women are manslaughter and homicide statutes. In *State v. McKnight*, Regina McKnight, a twenty-two-year-old African American woman, was charged with homicide after a stillbirth. In McKnight’s case, the South Carolina Supreme Court held that under South Carolina law, a viable fetus is a “child” within the meaning of the child abuse statute.

While prosecutors contend that punishing drug-addicted women protects the potential fetal life from abuse and ensures the fetus’s right to bodily integrity, the Supreme Court has held that the word “person” as used in the Fourteenth Amendment does not apply to the unborn. The unborn therefore are not entitled to constitutional protection despite what prosecutors argue when they claim that the fetus is a person entitled to legally recognized rights such as bodily integrity and right to life.

**A. The Federal Sentencing Guidelines**

In 1984, Congress passed the Sentencing Reform Act (hereinafter SRA), establishing the United States Sentencing Commission designed to promulgate judicial federal sentencing

---


72 *Id.* at 174-75 (interpreting S.C. CODE ANN. § 16-3-85 (2000)).


guidelines, establishing the “policies and practices” that would “provide certainty and fairness in ... sentencing, avoiding unwarranted sentencing disparities” between like offenders guilty of like criminal conduct, while maintaining sufficient flexibility to allow for consideration of individual mitigating and aggravating factors not taken into account by established general sentencing practices.

Congress had three main objectives in sentencing reform: first, honesty; reducing the disparity between time sentenced and actual time served; and clarification, eliminating the obscurity as to how the sentencing decision was made. Second, uniformity, achieving correspondence between the federal courts in sentencing like offenders for like criminal conduct. Third, proportionality, sentencing defendants in a manner consistent with the severity of their particular criminal conduct. The Commission identifies that there is a rift between proponents of those who call for scaling punishment to the offender’s culpability and resulting harm, and those who advocate for the imposition of punishment based on practical crime control considerations.

The SRA calls for the Guidelines to consider the nature and seriousness of the offense, and the history and characteristics of the defendant. These guidelines should promote respect for the law, just punishment for the offense (proportionality), adequate deterrence, protection of the public from the defendant’s future criminal activity, and rehabilitation. Other goals of the SRA may be to reduce the use of incarceration in sentencing, at least for some offenders, and to

---

76 They are published in the United States Sentencing Commission's Guidelines Manual.
increase public confidence in the criminal justice system.\textsuperscript{84} While judges are required to review the Guidelines in sentencing, the Guidelines are advisory\textsuperscript{85}, not mandatory. With the Guidelines’ advisory nature in mind, it remains important for judges to keep this legislative intent in mind when interpreting the Sentencing Guidelines.

In theory, the application of the Guidelines is mechanical. The introductory chapter of the Guidelines Manual (hereinafter “manual”) provide the judge general application principles.\textsuperscript{86} In reality; however, there is a great deal of judicial discretion as the judge identifies the component parts that will provide the fully calculated sentence.

First, the judge must refer to the statutory index, which cross-references the federal statutes with guideline sections, to determine the applicable guideline section.\textsuperscript{87} The applicable guideline provides a base level offense which is then adjusted based on specific offense characteristics. The judge then applies various sections from Chapter Three of the manual to the base offense level. These adjustments are for factors including the characteristics of the victims\textsuperscript{88}, the role that the defendant played in the offense\textsuperscript{89}, and defendant’s cooperation in the proceedings.\textsuperscript{90} Lastly the judge uses separate calculations to compute a sentencing range based on the sentencing table in Chapter Five of the manual.\textsuperscript{91} The range considers probation,

\textsuperscript{85} In 2005, Booker established that the Guidelines are effectively advisory, not mandatory. Justice Breyer, citing 18 U.S.C. § 3553(a), emphasized that the sentencing court is required to consider the guideline ranges, but is free to tailor the sentences “in light of other statutory concerns as well.” See United States v. Booker, 543 U.S. 220 (2005).
\textsuperscript{86} U.S.S.G. § 1B1.1.
\textsuperscript{87} U.S.S.G. App. A. See also U.S.S.G. § 1B1.2 (describing the rules and exceptions applicable to selecting the appropriate offense guideline section).
\textsuperscript{88} U.S.S.G. § 3A1.1-3A1.3.
\textsuperscript{89} U.S.S.G. § 3B1.1-3B1.4.
\textsuperscript{90} U.S.S.G. § 3C1.1.
\textsuperscript{91} U.S.S.G. ch. 5, pt. A.
restitution, imprisonment, community confinement, and fines. The judge may then decide whether an upward or downward departure is appropriate and sentence the defendant within the calculated range.

Despite the Guidelines, there is great judicial discretion in sentences, which now rests on a reasonableness analysis. In Weld’s case, enhancing her sentence on the grounds of substantial risk of harm to a minor, because she was involved in the manufacture of meth while pregnant, seems unreasonable. It does not effectively further the state interest in promoting fetal health while promulgating an excessively punitive system, restricting women’s rights, and implicating constitutional concerns.

**B. Gender and the Guidelines**

While the Guidelines are supposed to remove gender as a factor, it is clear that gender is a factor in many crimes and subsequent trials and sentencing decisions. Judge Varlan made Weld’s gender an issue, since he made pregnancy, an inherently female quality, an issue by using the child endangerment, substantial risk of harm to a minor, enhancement. His gendered deviation from the Guidelines; however, did not have to be upward. There were plenty of opportunities for a downward departure, including Section 5H1.6 Family Ties, Section 5K2.20 Aberrant Behavior, and Section 3E1.1 Acceptance of Responsibility.

Scholars contend that it is appropriate to consider gender in sentencing cases, but not in such a manner as to enhance penalties for non-violent drug-addicted mothers, keeping them...
away from their children and further reducing their chances of getting sober and obtaining employment to support their families. The Guidelines make an effort to produce identical sentences for males and females who commit similar crimes; however, this has never been successful. Instead, it imposes excessive and oppressive costs on families as well as women who are not like the violent male drug dealers who inspired the severe federal drug penalties. Gender-related differences can play a legitimate role in sentencing. Ignoring the gendered realities of caregiving, a completely gender-neutral sentencing scheme may potentially increase intergenerational crime.

**IV. Judge Varlan’s Poor Interpretation of the Guidelines in Weld**

Judge Varlan’s imposition of an enhanced sentence in Weld’s case was inappropriate. Applying the child endangerment enhancement of substantial risk of harm to a minor to women charged with the manufacture of meth is bad policy in conflict with important constitutional values and is a bad interpretation of the Guidelines. While substantial risk of harm to a minor has been a permissible child endangerment enhancement in other contexts, as a matter of interpretation, it should not be used in this way to punish Lacey Weld.

The United States Code Annotated (U.S.C.A) guides judges by providing that in determining the meaning of any “act of Congress, or of any ruling, regulation, or interpretation of...agencies of the United States, the words “person”, “human being”, “child”, and “individual”, shall include every infant member of the species homo sapiens who is born alive at any stage of development.”

The U.S.C.A. goes on to describe born alive, which was clearly not at issue in this case since the fetus was still in Weld’s womb. Additionally, the U.S.C.A. states in pertinent part that the section quoted above shall not be construed to affirm, deny, or expand any legal status or legal right applicable to “any member of the species homo sapiens at any point prior to being “born alive.”

It is clear here that fetuses are not accounted for, they are not a person

---

96 1 U.S.C.A. § 8 (West).
97 *Id.*
human being, child, or individual under the letter of the law. Therefore, applying the substantial risk of harm to the life of a minor enhancement is inappropriate.  

Section 2D1.1(b)(5)(C) of the United States Sentencing Guidelines provides for an increase of six offense levels when the defendant engaged in the manufacture of methamphetamine and created a substantial risk of harm to the life of a minor.\textsuperscript{98} In determining whether the offense created a substantial risk of harm to human life, the court may consider factors such as the quantities of the chemicals found in the laboratory, the manner in which the toxic substances were disposed\textsuperscript{99}, the duration of the offense, or the extent of the manufacturing operation, and the location of the laboratory.\textsuperscript{100}

Here, then, the question becomes whether a fetus is a minor or an incompetent for the purposes of sentencing. It is not. The definitions for the purposes of section § 2D1.1(b)(6)(B), define “incompetent” as an “individual who is incapable of taking care of the individual’s self or property because of a mental or physical illness or disability, mental retardation, or senility.”\textsuperscript{101} This clearly does not apply to a fetus as a fetus is not individual lacking the capacity to care for itself due to mental or physical illness, disability, mental retardation, or senility.

“Minor” is defined as “(A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.”\textsuperscript{102} Is a fetus an individual who has not attained the age of 18 years? Arguably not. Merriam-Webster defines minor as a

\textsuperscript{98} FCJ Federal Sentencing Guidelines Manual Amendment 608 (11/1/13).
\textsuperscript{99} This is relevant since the provision includes substantial risk of harm to the environment as well as to a minor or incompetent.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} U.S.S.G. 2A3.1
“person who is not yet old enough to have the rights of an adult.”\[^{103}\] A fetus is not a person and therefore not a minor. Allowing a fetus to be classified as a minor creates de facto fetal personhood, which has been explicitly prohibited by the laws of this country.\[^{104}\] The legal status of fetuses is hotly contested and allowing these laws designed to protect minors, people not old enough to have the rights of adults, would create policy problems and alienate much of the population.

In *United States v. Carney*, defendant was convicted of conspiracy to manufacture, distribute, or dispense five hundred grams or more of a mixture or substance containing a detectable amount of methamphetamine and carrying a firearm in relation to that crime.\[^{105}\] Carney was sentenced using a six-level sentencing enhancement pursuant to U.S.S.G. § 2D1.1(b)(5)(C) and appealed.\[^{106}\] The appellate court held that the substantial risk of harm to the life of a minor enhancement did not apply whenever manufacture of meth caused substantial risk of any type of harm to a minor, but rather, it required a type of harm that could cause death or serious injury that would adversely affect the life of a minor.\[^{107}\]

Carney argued that the phrase “harm to the life of a minor” contemplates serious harm, not just any harm. The government argued that the words “to the life” are inconsequential surplusage. On appeal, the court held that the district court erred by dismissing the words “to the life” when interpreting the guidelines, noting that Congress chose the specific words to carry meaning.\[^{108}\] Following rules of statutory construction, the court noted that the plain and unambiguous meaning of the statutory language must be followed and that the statute must be

\[^{104}\] The Supreme Court has rejected to make determinations concerning fetal personhood. However, *Roe v. Wade* allowed abortion, which if the fetus were considered a person, would be criminalized as murder.
\[^{105}\] *United States v. Carney*, 117 F. App’x 928 (5th Cir. 2004).
\[^{106}\] Id.
\[^{107}\] U.S.S.G. § 2D1.1(b)(5)(C), 18 U.S.C.A.
\[^{108}\] *Carney* at 930.
construed so that every word has some operative effect.\textsuperscript{109}

The appellate court concluded that if Congress had intended for § 2D1.1(b)(5)(C) to apply whenever the manufacture of methamphetamine caused a substantial risk of any type of harm to a minor, then it would have passed a law that said “substantial risk of harm to a minor.”\textsuperscript{110} However, Congress instead passed a law that requires a substantial risk of harm to the life of a minor.\textsuperscript{111} The inclusion of “to the life” indicates that Congress wanted to punish situations in which children faced a substantial risk of serious harm, as opposed to any type of harm.\textsuperscript{112} Therefore, harm “to the life of a minor” suggests a form of harm that could cause death or a serious injury that would adversely affect the life of a minor.\textsuperscript{113}

\textit{Carney} can be applied to Weld’s case. As discussed infra Part III A, the type of harm that Weld may have exposed her fetus to in the manufacturing of meth is not the type of harm that would cause death or serious injury that would adversely affect the life of a minor.\textsuperscript{114} As discussed infra Part II, Weld’s son was born alive and suffered withdrawal symptoms that will not likely continue to affect his life.

V. Conclusion

Allowing judges to consider pregnancy in sentencing drug-addicted women is another mechanism for devaluation and suppression. What is happening is ex poste facto law creation.

\begin{flushright}
\textsuperscript{109} Id. (citing \textit{United States v. Kay}, 59 F.3d 738, 742 (5th Cir. 2004).
\textsuperscript{110} \textit{Carney} at 930.
\textsuperscript{111} Section 3612(a)(2)(B) of the Methamphetamine Anti-Proliferation Act of 2000, Pub.L. 106-310.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} By definition, babies cannot be addicted to meth or anything else. Addiction is a technical term referring to compulsive behavior that continues despite adverse consequences. \textit{See} Open Letter From Doctors, Scientists, & Specialists Urging Major Media Outlets Not to Create “Meth Baby” Myth (July 25, 2014), \textit{available at} http://advocatesforpregnantwomen.org/%2522Meth%2522%20Open%20Letter%20-%202005.pdf. As described in the Open Letter, “in utero physiologic dependence on opiates (not addiction), known as Neonatal Narcotic Abstinence Syndrome, is readily diagnosable and treatable, but no such symptoms have been found to occur following prenatal cocaine or methamphetamine exposure.” Id.
\end{flushright}
and the creation of fetal personhood, whose life is valued higher than that of its mother, as a judicial fiat. Fetuses are not minors within the meaning of the Guidelines and even if a judge were to interpret the word “minor” to include fetuses, the harm caused by in-utero meth exposure is not enough to warrant the use of the substantial risk of harm to a minor enhancement. Keeping women away from their children and families not only makes them wards of the state; it also leaves the government to support the families on the outside. Additionally, prison does not offer the treatment that these women need to be competent mothers and contributing members of society.

The enhanced sentence is counterproductive. The judge should not be allowed the discretion to enhance a pregnant drug user’s sentence beyond what was explicitly permitted by the Legislature. Treatment and early intervention as well as better rehabilitative services are what states should look to in order to address the problem of drug-exposed newborns.

Using the child endangerment enhancement to justify harsher sentences for pregnant women, while not clearly unconstitutional, severely implicates constitutional rights to privacy and personal autonomy, supports racism, and impedes the goal of healthy families. Criminally prosecuting pregnant drug-addicted women creates a conflict between women’s rights to privacy and personal autonomy; the right of the fetus to physical integrity; and the right of the state in the prosecution of potential human life.

As seen in Judge Varlan’s decision, there is a state interest in protecting potential human life and prosecutors use criminal sanctions to protect fetus’ right to physical integrity justify imposing criminal sanctions against pregnant women. However, the results of these criminal prosecutions are counter to the state’s goal. The effect of these sanctions is the unjustified subordination of women that denies them constitutional guarantees.